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NTSB Order No. EA-3916

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of June, 1993

_____)	
JOSEPH M. DEL BALZO,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-11541
v.)	
)	
EDWARD M. PLEUS,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on May 14, 1991, following an evidentiary hearing.¹ By that decision, the law judge reversed an order of the Administrator revoking respondent's pilot certificate because of false entries which he allegedly made in certain pilot records which were

¹The initial decision, an excerpt from the hearing transcript, is attached.

discovered by the Federal Aviation Administration ("FAA") during the course of an inspection of respondent's former employer.²

The Administrator contends on appeal that the law judge's initial decision must be reversed because respondent's claim, which the law judge accepted, that he did not intentionally falsify the pilot records is inherently incredible in light of the purpose and meaning of the form which is in question. Respondent has filed a brief in reply, urging the Board to affirm the initial decision. For the reasons that follow, we deny the Administrator's appeal.

The facts are not in dispute. In 1979, respondent was employed as a pilot for Tyee Airlines. In September, 1982, Tyee Airlines merged with Southeast Alaska Airlines ("SEA Air"), and respondent became the chief pilot and a check airman for the merged carrier. In 1983, SEA Air reverted back to the name Tyee.

On January 1, 1985, TEMSCO Helicopters purchased Tyee Airlines, and the new company became known as TEMSCO Airlines. Respondent left TEMSCO in 1985 but returned and worked for that company intermittently as a pilot and check airman from 1987 through

²The Administrator alleged that, as a result, respondent violated section 61.59(a)(2) of the Federal Aviation Regulations (FAR) which provides as follows:

"61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.

(a) No person may make or cause to be made....

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance or exercise of the privileges, or any certificate or rating under this part..."

1989. During the course of an inspection of TEMSCO in 1989, the FAA's principal operations inspector ("POI") questioned the accuracy of certain pilot records.

The subsequent investigation focused on four forms, all of which had been signed by respondent. These records concerned the initial operating experience ("IOE")³ acquired by certain pilots who had worked with respondent at Tyee, SEA Air, and, TEMSCO. The form in question reads as follows:

I CERTIFY THAT _____ HAS A MINIMUM OF TEN FLIGHT HOURS AS PILOT IN COMMAND OF A SINGLE ENGINE DEHAVILLAND, AND TEN FLIGHT HOURS AS PILOT IN COMMAND OF A SINGLE ENGINE CESSNA IN COMMUTER AIR CARRIER OPERATIONS AT _____ AIRLINES OF (ADDRESS) _____ UNDER MY SUPERVISION AS REQUIRED UNDER PART 135.244 OF THE F.A.R.'S BETWEEN THE DATES OF ____AND____.

COMPANY CHECK AIRMAN

AIRLINES

DATE _____

AIRCRAFT FLOWN IN COMMUTER AIR CARRIER OPERATIONS:

DEHAVILLAND: _____

CESSNA: _____

The Administrator alleges that on three of the forms, respondent indicated that the pilot had acquired his IOE between

³FAR § 135.244 requires that a pilot acquire a minimum of 10 hours of operating experience under the supervision of a qualified check pilot in each make and basic model of a single engine aircraft to be flown by a Commuter Air Carrier in passenger-carrying operations before the pilot may be designated to serve as a pilot in command.

the dates of "9/82" and "1/83," when respondent was a check airman and the chief pilot for SEA Air; and on the fourth form, signed in 1988 when respondent was a check airman for TEMSCO, he indicated that the IOE requirement for that pilot was acquired in 1988. The Administrator alleges that because none of the four pilots had actually obtained their respective IOE requirement when respondent was their supervisor, respondent a fortiori falsified the forms.

Respondent claims that, notwithstanding what his signature may appear to have indicated, he intended to indicate only that when these four pilots were under his supervision, he had verified that they were qualified to be designated as pilots in command. Respondent claims that he signed the forms only after he had personally reviewed the individual pilot's records. An example of this type of source document was entered into evidence as Respondent's Exhibit R-2. It shows the dates of "135.244(a) (b) Training," the departure and destination of the flight, the number of landings, the flight time, the type of aircraft, and the signature of the check airman. Moreover, respondent asserts that the dates shown on the forms he signed are not false because they are the dates during which he verified the information from the source documents.⁴ Respondent also testified that he knew of

⁴As to the form signed by respondent in 1988, the pilot who is the subject of that record testified that in 1989, he asked respondent to reconstruct his IOE certificate, which had been lost. Respondent verified that he knew that the pilot had been given his IOE in the Cessna 185 and DHC-2 at Tyee by Herman Ludwigsen, and that he had personally given the pilot his IOE in the DHC-3. Respondent signed the form (Exhibit C-1) but was

each pilot's IOE qualifications from having personally flown with all of them with their predecessor companies, and that in certain instances he had been the check airman who had supervised the IOE.⁵ Respondent's claims are corroborated by the testimony of the pilots who are the subjects of the forms and the testimony of other check airmen employed by the companies, all of whom appeared on behalf of respondent. The Administrator does not dispute the fact that these pilots were actually IOE qualified at the time respondent executed the forms.

Kirk Thomas was the sole owner of Tyee and became the President and General Manager of SEA Air after the 1982 merger. According to Mr. Thomas, this form was an "in-house" form which he created, with the approval of the then-current POI in order to standardize the records of the two merged companies. Mr. Thomas insists that the form was not required by any FAA regulation, and that it was used only by the dispatchers and management so they could look at one record and quickly see which pilots were qualified to be dispatched in a particular aircraft. Mr. Thomas also identified Exhibit R-2 as a separate form which was on file in his company and which could show compliance with FAR section 135.244.

Respondent testified that when he left TEMSCO the pilot
(..continued)
unable to explain why he dated it in 1988. As to the listing of the Cessna 206 below his signature, he was uncertain if it was listed on the form when he signed it.

⁵An FAA inspector testified that respondent had claimed to have given all of the IOE training when he was first interviewed.

records were intact and the source documents similar to Exhibit R-2 were filed with the IOE forms he had signed. At the time of the inspection in 1989, however, the records containing the actual dates when IOE was acquired had been purged by TEMSCO, in accordance with the provisions of FAR section 135.63, which requires that pilot qualification records need only be retained for twelve months.

The law judge found that the evidence was too inconclusive to support a finding that respondent violated FAR section 61.59.

The judge states in the initial decision that he was persuaded that the dates shown on the form only reflect a period of time when the four pilots were under respondent's supervision, and not that respondent administered or supervised the acquisition of the IOE.

The question before the Board in this appeal is whether respondent's claims, which were accepted by the law judge, are inherently incredible in light of the plain language of the form.

The Administrator argues that respondent must have intended to make false entries, because, "[w]hile the language in the IOE form arguably could be more explicit, it is clear on its face that its purpose and meaning are unambiguous." We disagree.

The Board finds that the purpose and meaning of this form, considered in light of the testimony regarding its creation and use by SEA Air, is far from clear. Nor does the evidence convince us that the forms were "required to be kept, made, or used, to show compliance with any requirement for the issuance or

exercise of the privileges, or any certificate or rating under" Part 61. Even though an FAA inspector testified that the form was used to show pilot qualifications under FAR section 135.244, his testimony is contradicted by the provisions of FAR section 135.63 which, as respondent points out, provides that records concerning an individual pilot's experience need not be retained by a certificate holder for more than twelve months. While a system seems necessary to keep track of the pilots' qualifications to ensure that only qualified pilots are designated as pilot in command, particularly as the various carriers merged together to form new companies, the Administrator fails to offer any reason why respondent and SEA Air were precluded, in the absence of a system established by the Administrator, from summarizing the information and putting it in any format they chose,⁶ particularly when the source documents were filed with the summary, so that they might be incorporated by reference into the documents signed by respondent.⁷ Finally, we do not think that respondent should be penalized because, subsequently, a successor company destroyed those source

⁶In the preamble to the final rule amending Section 135.244, the Administrator states that IOE requirements will not be burdensome because the requirement need only be met one time for a particular make and basic model aircraft, i.e., once-in-a-lifetime, and because the requirement can be transferred by the pilot to another certificate holder, "provided satisfactory documentation is provided to the new certificate holder...." 45 Fed. Reg. 80460, 80461 (December 4, 1980).

⁷In fact, a 1987 memorandum from FAA Headquarters which was referred to in the testimony of one FAA inspector, appears to consider "single line entries" sufficient to show compliance with FAR section 135.244.

documents in accordance with the Administrator's own regulations.⁸

Rather than speculate on the exact "purpose and meaning" of this form, the law judge grounded his decision in implicit credibility findings in favor of respondent and his supporting witnesses, and the Administrator has offered us no persuasive reason to reverse these findings. See Administrator v. Valentine and Rand, NTSB Order No. EA-3749 at 6-7 (1992)(In the absence of evidence that respondents had something to gain by falsifying records, law judge's acceptance of their explanation is not arbitrary or capricious so as to warrant reversal). Board precedent is clear that credibility determinations are generally within the exclusive province of the law judge and will not be disturbed in the absence of arbitrariness, capriciousness, or other compelling reasons. Administrator v. Smith, 5 NTSB 1560, 1563 (1986).

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The initial decision is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁸We also do not view the fact that these forms were reviewed by an FAA inspector during an inspection of TEMSCO as convincing evidence of SEA Air's purpose in creating the form.